UNI WALL ARCHITECTURAL PRODUCTS & SERVICES SDN BHD

v.

GLOBAL UPLINE (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH JC
[SUIT NO: D22-1531-2009]
30 NOVEMBER 2010

***CIVIL PROCEDURE**: Writ of summons - Setting aside - Writ filed in Kuala Lumpur and served in Sarawak - Rules of the High Court 1980, O. 12 r. 4(b) - Whether mistake unintentional and curable under O. 2 r. 3 RHC - Whether mistake prejudiced defendant or occasioned miscarriage of justice - Defendant had place of business in Sarawak - Whether good reason to apply to set aside writ for want of jurisdiction*

The plaintiff in the instant action sought to recover the amount stated in a cheque from the defendant which was dishonoured when presented for payment. The writ was filed in Kuala Lumpur and served on the defendant in Kuching, Sarawak. It however wrongly stated the time limited for entry of appearance as eight days when it should have been 20 days as per O. 12 r. 4(b) of the Rules of the High Court 1980 ('RHC'). Nevertheless, the defendant within 18 days of service of the writ obtained leave of court to enter conditional appearance, the condition being to apply to set aside the writ within 30 days of the grant of leave. The defendant obtained an *ex parte* order for extension of time to file the application to set aside the writ and to stay all proceedings until the application was determined. The plaintiff *vide* encl. 17 applied to set aside the *ex parte* order while the defendant filed its application to set aside the writ *vide* encl. 13. At the hearing of encl. 17 the registrar allowed the defendant's objection that in view of the stay order encl. 17 should be stayed until encl 13 had been heard. Against that order, the plaintiff filed an appeal *vide* encl. 21 to the judge. At the hearing of both encls. 13 and 21 before the judge, the defendant contended that the mistaken endorsement on the writ as to the time limited for appearance was a non-curable non-compliance of the rules of court even if the defendant had not suffered any prejudice. The defendant also submitted that because the case concerned a contract undertaken in Kuching, Sarawak and all documents and witnesses pertaining thereto were in Kuching, the proper forum for the action was the Kuching High Court.

Held (dismissing encl. 13 with costs and making no order on encl. 21):

(1) The plaintiff's non-compliance with the RHC in giving the defendant only eight days to enter appearance did not occasion a miscarriage of justice. No adverse order was obtained against the defendant during the eight-day period. The non-compliance was an irregularity curable under O. 2 r. 3 RHC. To rule otherwise and to require the plaintiff to re-file the writ would have meant more delay in resolving the dispute between the parties and ran counter to the dictates of O. 1A RHC. (para 46)

(2) The facts of the instant case did not show an act of deliberate non-compliance. According to the plaintiff, the error was an unintentional clerical mistake. There was no suggestion by the defendant that it was anything but a mistake. As such, the correct position to take was to determine whether the defendant had suffered any prejudice as a result of the non-compliance and to have regard to the justice of the case without dwelling overly on technical non-compliance where no substantial miscarriage of justice had occurred. (paras 44 & 45)

(3) The plaintiff's claim was premised on the dishonouring of a cheque issued by the defendant when it was presented for payment at the plaintiff's bank in Kuala Lumpur. There was no mention about the construction of any building or any issue about any breach of contract in relation thereto. Although the High Court at Kuching also had jurisdiction by virtue of the fact the defendant had its place of business in Sarawak, that fact did not allow the defendant to apply to strike out the writ for want of jurisdiction. (paras 47 & 48).

Case(s) referred to:

Bank Simpanan Nasional v. Abdul Mutalib Mohd Salleh [2005] 7 CLJ 1 HC ***(refd)***

Bank Utama (Malaysia) Bhd v. Perkapalan Dai Zhun Sdn Bhd [2003] 1 CLJ 450 HC ***(refd)***

Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11 HC ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

Enersafe Sdn Bhd v. Megarina Sdn Bhd [2006] 2 CLJ 1021 CA ***(foll)***

EON Bank Berhad v. Cepad Group Sdn Bhd & Ors [2004] 1 LNS 377 HC ***(refd)***

Kenichi Hattori & Anor v. Minoru Yamashita & Anor [2004] 1 CLJ 491 HC ***(foll)***

Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 HC ***(refd)***

MBT (Malaysia) Sdn Bhd v. Asawira Sdn Bhd [2004] 1 CLJ 661 HC ***(refd)***

Metroinvest Anstalt and Ors v. Commercial Union Assurance Co Plc [1985] 2 All ER 318 ***(refd)***
Munusamy Karuppiah v. Sang Lee Company Sdn Bhd & Ors [2010] 3 CLJ 924 CA ***(refd)***
OCBC Bank (M) Bhd v. Astano Electric Sdn Bhd [1999] 8 CLJ 369 HC ***(refd)***
Pakata Sdn Bhd v. Chean Seong Fatt & Ors [2001] 6 CLJ 318 HC ***(refd)***
Perak Hanjoong Simen Sdn Bhd v. Perindustrian Tenaga Mix Sdn Bhd [2008] 6 CLJ 652 HC ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor & Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(refd)***
Shorga Sdn Bhd v. Amanah Raya Bhd [2004] 1 CLJ 417 HC ***(refd)***
Sogelease Advance (Malaysia) Sdn Bhd v. Kemajuan Tat Young Sdn Bhd & Ors [1999] 5 CLJ 331 HC ***(refd)***
Spillada Maritime Cop v. Consulex Ltd (The Spillada) [1986] 3 All ER 843 ***(refd)***
Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd [2003] 2 CLJ 177 CA ***(refd)***
Tan Poey Kheng v. Ma Peng Kiat [1983] 1 LNS 56 HC ***(refd)***
Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal [1993] 3 CLJ 210 SC ***(refd)***
Yap Siew Tiong v. Matsushita Industrial Corporation Sdn Bhd [2003] 7 CLJ 266 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 23(1)(a), (b), (c) (d)
Rules of the High Court 1980, O. 1A, O. 2 rr. 1(2), 2, 3, O. 6 rr. 2(1)(b), 7(2A), O. 12 rr. 4(b), 7, O. 14, O. 32 r. 6

For the plaintiff - CJ Siew (KY Lee with him); M/s Douglas Yee
For the defendant - Dato' Sri Muhammad Shafee Abdullah (R Vasanthi with him); M/s Shafee & Co

Reported by Ashok Kumar

JUDGMENT

Amelia Tee Abdullah JC:

[1] The plaintiff, Uni Wall Architectural Products & Services Sdn Bhd has claimed against the defendant, Global Upline (M) Sdn Bhd, for a sum of RM1,500,000 being the amount on a Bank Muamalat cheque given by the defendant that was dishonoured when presented for payment at HSBC, the plaintiff's bank.

[2] Two enclosures have been fixed for hearing in this case. Enclosure 13 is the defendant's application to set aside the writ of summons and statement of claim dated 29 January 2010. Enclosure 21 is the plaintiff's notice of appeal to the judge in chambers against the

decision of the Senior Assistant Registrar (SAR) in allowing the plaintiff's preliminary objection and ordering that the hearing of encl. 17 be stayed pending the disposal of encl. 13.

[3] Learned counsel for the plaintiff submitted that encl. 21 should be heard first whereas counsel for the defendant contended that encl. 13 should be heard first. At the suggestion of the court, it was agreed by both parties that both enclosures would be heard together.

Chronology Of Events

[4] The plaintiff filed his writ of summons and statement of claim on 6 August 2009. The writ and statement of claim which were served on the defendant at No. 122 & 123 RH Plaza, Jalan Lapangan Terbang, 93350 Kuching, Sarawak on 2 November 2009 gave the defendant eight days from the date of service of the writ to enter appearance.

[5] The defendant applied *ex parte* for leave to enter conditional appearance. Leave was granted on 20 November 2009. The defendant was to apply to set aside the writ within 30 days of the date of the order which meant that the application to set aside the writ was to have been made on or before 19 December 2009.

[6] The defendant next filed an *ex parte* application for extension of time until 29 January 2010 to file the application to set aside the writ (encl. 8). Other prayers sought for was an order to stay all proceedings until the defendant's application to strike out the writ was determined and an order for the costs of the application to be borne by the plaintiff. The application was granted on 15 December 2009.

[7] In the meantime the plaintiff, not having been served with the defendant's two preceding applications, filed an application on 6 January 2010 for summary judgment under O. 14 RHC (encl. 10).

[8] On 29 January 2010, the defendant finally filed its application to set aside the writ of summons to set aside the writ (encl. 13).

[9] On 25 February 2010, the plaintiff filed an application (encl. 17) to set aside the order dated 15 December 2009 as well as to strike off the summons in chambers dated 29 January 2010. At the hearing of encl. 17 fixed on 17 August 2010, the defendant raised a preliminary objection to the effect that the hearing of encl. 17 cannot be proceeded with as there was a stay of proceedings in place and therefore encl. 13 must be disposed off first before encl. 17. The learned SAR allowed the defendant's preliminary objection and ordered that encl. 17 be stayed pending the disposal of encl. 13.

Enclosure 13: The Defendant's Application To Set Aside The Writ Of Summons And Statement Of Claim

The Defendant's Position

[10] Enclosure 13 is the defendant's application to set aside the writ of summons and statement of claim. The defendant relies on O. 12 r. 7 RHC and raises two main grounds, namely:

(i) Defective writ of summons; and

(ii) *Forum non conveniens.*

Defective Writ Of Summons

[11] The defendant contends that the plaintiff had filed the writ of summons at the registry of the High Court in Kuala Lumpur and the same was served on the defendant at No. 122 & 123 RH Plaza, Jalan Lapangan Terbang, 93350 Kuching, Sarawak. However, the endorsement on the writ for the defendant to enter appearance was eight days upon service of the writ and not 12 days. This is contrary to the provisions of O. 12 r. 4 of the RHC and therefore the writ should be set aside as it was defective as to the time to enter appearance.

[12] The defendant submits that since the writ was issued by the Kuala Lumpur High Court and intended for service in Sarawak, the defendant should have been given a period of 12 days in accordance with O. 12 r. 4 of the RHC. Reference was made to the cases of *OCBC Bank (M) Bhd v. Astano Electric Sdn Bhd* [1999] 8 CLJ 369 and *Yap Siew Tiong v. Matsushita Industrial Corporation Sdn Bhd* [2003] 7 CLJ 266 in connection with the local jurisdiction of the court.

[13] The defendant submits that although the plaintiff had contended that such an error is merely an inadvertent clerical mistake, had not caused any prejudice to the defendant because it was allowed to enter conditional appearance and that such irregularity was curable, it cannot be assumed that such an error did not prejudice the defendant just because it was able to enter conditional appearance. The defendant contends that it must not be deprived of its right to have 12 days to properly scrutinize documents.

[14] The defendant further submits that in connection with non-compliance with the rules, the curing provision should not be wantonly utilized and cites the case of *MBT (Malaysia) Sdn Bhd v. Asawira Sdn Bhd* [2004] 1 CLJ 661 where the High Court declined to invoke O. 2 r. 1 of the RHC because it said that there was "a blatant non-compliance with the very basic and fundamental rules of the court".

[15] The defendant has also drawn the court's attention to the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329 where the Federal Court held that a general provision such as O. 1A of the RHC must not supersede a mandatory requirement of the Rules. The court went on to say that O. 1A cannot be invoked when a party intentionally disregards in complying with the Rules. The court held that since the respondents had intentionally disregarded O. 6 r. 7(2A) for their own reasons, O. 1A RHC did not apply.

[16] As such, the defendant submits that the plaintiff cannot assume that they are relieved from the duty to comply with the RHC just because no prejudice was caused to the defendant when they were able to enter appearance in time despite the defective writ.

Forum Non Conveniens

[17] The defendant takes the position that the correct and proper forum for this matter is the Kuching High Court and not the Kuala Lumpur High Court based on the following reasons:

(i) The plaintiff's registered and business addresses are in Kuching, Sarawak;

(ii) This action is in respect of the construction of a 12 storey hotel on Lots 3186, 3187 and 7143 Blok 16 KCLD, Kuching, Sarawak;

(iii) The breach of contract accrued in Sarawak when the plaintiff failed to remedy the defects to the building;

(iv) The cheque in question was issued by Bank Muamalat in Kuching, Sarawak; and

(v) All correspondences in relation to this matter were addressed to the defendant in Kuching, Sarawak.

[18] The defendant disputes the plaintiff's contention that the defendant's difficulty in travelling back and forth to attend the matter in Kuala Lumpur is not a relevant consideration. Reliance was placed by the defendant on the case of *Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd* [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11 where the High Court held that since the defendant/respondent was residing in Kuching and the witnesses being there, Kuching would be more convenient considered from the point of view of convenience.

[19] Learned counsel for the defendant submits that this court should decline to exercise jurisdiction on the ground that this case must be heard by a more accessible court. It was pointed out that the subject

matter of the case is a project in Kuching, Sarawak and all documents and witnesses pertaining to the action are in Kuching, Sarawak. Based on the afore-stated cases and other authorities such as *Bank Utama Malaysia Bhd v. Perkapalan Dai Zhun Sdn Bhd* [2003] 1 CLJ 450; *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22 and *Spillada Maritime Cop v. Consulex Ltd (The Spillada)* [1986] 3 All ER 843, the defendant contends that the *forum conveniens* is in Kuching, Sarawak.

The Plaintiff's Position

[20] The plaintiff concedes that pursuant to O. 12 r. 4 of the RHC, the defendant has a period of 20 days to enter appearance. The error, he submits, was a clerical mistake that was made unintentionally.

[21] The plaintiff submits that the defendant has not positively asserted that they had suffered prejudice. It contends that no prejudice has been caused to the defendant by virtue of the non-compliance. No judgment in default of appearance was entered on the basis of the period of eight days as stated in the writ of summons. As such, the non-compliance is not fatal and incurable *per se* but only an irregularity that can be cured under O. 1A and/or O. 2 r. 1 & 2 of the RHC.

[22] The plaintiff relied on the case of *Pakata Sdn Bhd v. Chean Seong Fatt & Ors* [2001] 6 CLJ 318 where the 1st defendant had sought to have the writ and subsequent proceedings set aside on the grounds that the writ should have been a 12 day writ instead of an eight day writ. There His Lordship Arifin Zakaria J (as His Lordship then was), guided by English CA in the case of *Metroinvest Anstalt and Ors v. Commercial Union Assurance Co Plc* [1985] 2 All ER 318, held that as the 1st defendant was not at all prejudiced by the irregularity in the writ, there would be no injustice if the court were to order that the irregularity be cured under O. 2 r. 1(2).

[23] Reference was also made to the case of *Bank Simpanan Nasional v. Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1 where the defendant had raised a preliminary objection on the ground that the time limited for appearing should be 12 instead of eight days. There His Lordship Low Hop Bing referred to O. 1A and O. 2 r. 3 and held that there was no merit in the defendant's preliminary objection because the non-compliance had not occasioned a substantial miscarriage of justice.

[24] On the issue of jurisdiction, it is the plaintiff's contention that their claim is based on the fact that a Bank Muamalat Malaysia Berhad cheque No. 307279 issued by the defendant to the plaintiff had been dishonoured for payment upon presentation to the HSBC Bank in Peninsular Malaysia. The plaintiff submits that the cause of action accrued immediately upon the cheque being dishonoured for payment and thus the High Court of Malaya has jurisdiction.

[25] The plaintiff relies on the cases of *Sogelease Advance (Malaysia) Sdn Bhd v. Kemajuan Tat Young Sdn Bhd & Ors* [1999] 5 CLJ 331 and *Enersafe Sdn Bhd v. Megarine Sdn Bhd* [2006] 2 CLJ 1021 in support of their argument that subparas. (a), (b), (c) and (d) of s. 23(1) of the Courts of Judicature Act 1964 must be viewed at disjunctively. As such, the plaintiff submits that even though the High Court of Sarawak also has jurisdiction to try this case, it does not warrant the striking out of this action for want of jurisdiction.

Enclosure 21: The Plaintiff's Appeal Against The Decision Of The SAR Allowing The Defendant's Preliminary Objection

The Defendant's Position

[26] The defendant has raised a preliminary objection that the decision of the learned SAR is not an appealable decision. The defendant submits that whilst the decision of the SAR is a ruling made in the course of a trial or hearing of a cause or matter, it does not dispose of the rights of the parties. Learned counsel for the defendant pointed out that the substantive matter is still there. As such, the decision of the SAR does not fall within the definition of "decision" in s. 3 of the Courts of Judicature Act, 1964 as there is no finality in the said order which did not dispose of the rights of the parties.

[27] The defendant submits that such a decision of the SAR is but a procedural ruling and there is thus no avenue of appeal. Reliance is placed on the case of *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210 where the appellants had appealed against the ruling of the learned judge that he dispose of encl. 27 (the substantive notice of motion) before dealing with encl. 21 (the appellant's application to set aside the injunction). The Supreme Court observed that this was clearly an appeal against a mere procedural ruling and that "the court has always discouraged such appeals as they stand in the way of a speedy disposal of substantive trials and delay an expeditious result of the main proceedings".

[28] In its submissions, the defendant has also cited a number of other authorities. In the case of *PP v. Raymond Chia Kim Chwee & Anor and Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260, the Supreme Court held that the word "order" preceded by the words "judgment" and "sentence" means that the order must be a final order in the sense that it is final in its effect as in the case of a judgment or sentence. In the case of *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* [2003] 2 CLJ 177, the Court of Appeal held that any ruling made in the course of a trial or hearing of any cause or matter which do not

finally dispose of the rights of the parties do not constitute a decision for the purpose of s. 3 of the Courts of Judicature Act 1964. However, the plaintiff has attempted to distinguish these two authorities which do not deal with preliminary objections but with admissibility of documents during a trial.

The Plaintiff's Position

[29] The plaintiff submits that the defendant's preliminary objection should be dismissed because the decision of the SAR is appealable. The plaintiff cites the cases of *Eon Bank Bhd v. Cepad Group Sdn Bhd & Ors* [2004] 1 LNS 377, *Shorga Sdn Bhd v. Amanah Raya Bhd* [2004] 1 CLJ 417 and *Perak Hanjoong Simen Sdn Bhd v. Perindustrian Tenaga Mix Sdn Bhd* [2008] 6 CLJ 652 in support of its contention. It is argued that the right of appeal against the decision of the SAR has not been excluded by s. 3 of the Courts of Judicature Act 1964. In *Perak Hanjoong Simen* (*supra*), the plaintiff had raised a preliminary objection against Messrs Tee & Partners from representing the defendant on grounds of conflict of interest. The defendant appealed against the decision of the SAR who allowed the plaintiff's preliminary objection. The plaintiff raised a preliminary issue, ie, that the decision of the SAR was not appealable as it did not constitute a decision that could be appealed from as stipulated under s. 3 of the Courts of Judicature Act, 1964.

[30] In dismissing the appeal, Rohana Yusuf J held as follows:

> ... under O. 56 r. 1 of the Rules of the High Court 1980 (RHC), "an appeal shall lie to a judge in chambers from any judgment, order or decision of the registrar." As submitted by Encik Tee, the decision of the SAR is appealable because under O. 56 r. 1 of the RHC an appeal can be made to a judge in chambers from any judgment, order or decision. The terms "judgment, order or decision" are not qualified to only decisions that can dispose of the rights of parties. In fact they are not qualified in any way. Thus, it is clear that the decision of the SAR herein is therefore appealable under the said O. 56 r. 1 of the RHC. Furthermore, an appeal to a judge in chambers is a rehearing and is treated as though it comes before the court for the first time as decided by the Federal Court case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241.

[31] Re the merits of the appeal, the plaintiff submits that the court can set aside an order that was made *ex parte*. Reference was made to the case of *Tan Poey Kheng v. Ma Peng Kiat* [1983] 1 LNS 56 where Mohamed Dzaiddin J (as His Lordship was then) held that O. 32 r. 6 of the RHC provides that the court may set aside an order made

ex parte and that this rule embodies the fundamental rule of practice that a party affected by an *ex parte* order may apply to the court to discharge it, in as much as he has not had an opportunity of being heard. In the more recent case of *Munusamy Karuppiah v. Sang Lee Company Sdn Bhd & Ors* [2010] 3 CLJ 924, the Court of Appeal said that O. 32 r. 6 of the RHC is a good piece of legislation "because it protects the basic right of the litigants in that the party who has not been heard may apply to the court to have that order discharged forthwith".

[32] The plaintiff submits that to allow the SAR's decision to stand will cause grave injustice to the plaintiff. Although the plaintiff had applied to set aside the *ex parte* order *vide* encl. 17, the SAR's decision to stay the hearing of encl. 17 pending the disposal of encl. 13 had rendered encl. 17 nugatory and meaningless. This is especially so when the *ex parte* order, which includes a stay of all proceedings, was made on an *ex parte* basis without giving an opportunity to the plaintiff to oppose the same.

Decision

[33] In respect of encl. 13, the court notes that the endorsement on the impugned writ for the defendant to enter appearance was eight days. Notwithstanding the defendant's submission that the time limited for entering appearance is 12 days, the court finds that it clear from a reading of O. 12 r. 4(b) that the time for entering appearance in this case should be 20 days as the writ was to be served in Sarawak from a writ issued in Kuala Lumpur.

[34] Having established that the time endorsed for the defendant to enter appearance is wrong, the next question for determination is this: what is the effect of such an error. Is such a defect in the writ fatal as claimed by the defendant or is it only an irregularity which is not fatal *per se* but curable under O. 1A and/or O. 2 r. 1 & 2 of the RHC as contended by the plaintiff?

[35] The court has considered the arguments of the plaintiff that the non-compliance is not fatal *per se*, that it is only an irregularity that is curable. The court has also scrutinized the authorities submitted by the plaintiff in support of its submissions. In the case of *Pakata Sdn Bhd* (*supra*), the 1st defendant had raised two alternative grounds to have the writ set aside, namely that there was an irregularity as the writ should have been a 12 day writ instead of an eight day writ and secondly, that the name on the writ was wrong, and therefore the wrong person had been sued.

[36] In deciding whether the irregularity could be cured under O. 2 r. 1(2) of the RHC, His Lordship had followed the views of Bruce LJ in the case of *Metroinvest Anstalt* that the way the court would exercise its powers under O. 2 r. 1(2): A

> is likely to depend on whether it appears that the opposite party has suffered prejudice as a **direct consequence** of the particular irregularity, that is to say the particular failure to comply with the rules. But I would construe O. 2 r. 1(2) as being so framed to give the court **the widest possible power in order to do justice**. (emphasis added) B

[37] In the case of *Bank Simpanan Nasional* (*supra*), His Lordship Low Hop Bing had used the substantial miscarriage of justice test. As stated by His Lordship: C

> the issue raised by the defendant herein is highly technical in nature which has not occasioned a substantial miscarriage of justice and may be dealt with under O. 1A which came into force on 16 May 2002. O. 1A provides that in administering any of the rules herein, the court or a judge shall have regard to the justice of the case and not only to the technical non-compliance with any of the rules herein. D
>
> Under O. 2 r. 3, a court or judge shall not allow any preliminary objection by any party to any cause, matter or proceedings only on the ground of non-compliance with any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice. E

[38] The court has carefully perused the two cases relied on by the defendant. The court notes that in the case of *MBT (Malaysia) Sdn Bhd* (*supra*), the learned judge found that there was "blatant non-compliance with the very basic and fundamental rules of the court". The court found that the plaintiff had failed to comply with the mandatory provisions of O. 6 r. 2(1)(b) and form 2 of the RHC; that the writ did not state the amount of costs being claimed and had only given the defendant eight days to pay the amount claimed. The learned judge had referred to a circular letter dated 10 April 2000 issued by Tun Dato' Seri Eusoff bin Chin, the former Chief Justice of Malaysia, which directed that "writs, summons, affidavits and other documents filed which do not comply with the rules should be rejected". In that case, there was also an issue about the service of the writ during the court vacation, which service the court had held to be "invalid, ineffective and void". F G H

[39] The court has carefully perused the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail* (*supra*) which was heavily relied upon by the defendant but find the facts in that case to be somewhat different from the facts of our instant case. The facts of the case have been recounted I

at quite some length as they were very pertinent to the decision that was arrived at. The respondent had filed a writ of summons at the Singapore High Court on 20 September 2000. Simultaneously, he filed two other writ actions containing almost identical pleadings and cause of action at the High Courts at Shah Alam and Kuala Lumpur. During case management of the Singapore action, the Singapore SAR had stayed the Singapore writ and ordered the Shah Alam writ to be served. By the time that the respondent's appeal against the order was given by the Singapore Court of Appeal, about 16 months had elapsed from the filing of the Shah Alam action. Meanwhile, the respondents applied *ex parte* and obtained two extensions of the Shah Alam and Kuala Lumpur writs. No attempts were made to serve either writ on the appellant.

[40] The appellant filed two appeals against the orders for the extension of the writs. In that case the questions for determination were whether the requirement of showing such efforts that have been made to effect service of the writ under O. 6 r. 7(2A) RHC is a mandatory prerequisite to the exercise of discretion under O. 6 r. 7(2) and secondly, in the event of failure to comply with the prerequisite, whether O. 1A RHC can be invoked to cure that failure.

[41] In the afore-stated case, the Federal Court was dealing with the application of O. 6 r. 7(2A) when it held that before granting an extension of the writ, the court must be satisfied that serious efforts have been made to serve it. The court went on to hold that a:

> simple and plain statement that efforts had been made to serve cannot be a sufficient ground. The affidavits must provide detailed facts as to when and how attempts to serve were made. Otherwise O. 6 r. 7(2A) RHC will become a dead letter. The object of the rule will be defeated.

And at p. 345, His Lordship Zaki Tun Azmi CJ held as follow:

> The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O. 1A RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. O. 1A RHC cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise parties would be encouraged to ignore the Rules. Thus in this case, O. 1A RHC does not apply as the respondents had intentionally disregarded O. 6 r. (2A) for their own reasons.

[42] And for the sake of completeness, the Federal Court also defined "technical non-compliance" as a non-compliance with a rule which is not fundamental or mandatory in nature.

[43] It is true that the cases cited by learned counsel for the plaintiff are decisions of the High Court whereas the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail* (*supra*) referred to by the defendant is a decision of the Federal Court. However, upon a careful reading of the authorities cited, the court is satisfied that the facts of the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail* (*supra*) can be distinguished. The Federal Court had refused to invoke O. 1A because the facts clearly showed that the respondents had "intentionally disregarded" O. 6 r. 7(2A) of the RHC for their own reasons. The filing of three similar actions in the High Court in Singapore, Kuala Lumpur and Shah Alam, the fact that no steps were taken to serve the writ while awaiting the decision of the Singapore Court of Appeal and the filing of *ex parte* applications for extensions are all facts which speak for itself. It was as a result of the deliberate actions of the respondent, the deliberate acts of non-compliance which caused the Federal Court to decline to invoke O. 1A of the RHC.

[44] However, the facts of our instant case do not show a similar act of deliberate non-compliance. According to the plaintiff, the error was a clerical mistake that was made unintentionally. There is no suggestion by the defendant that the citing of only eight days for entering appearance was anything but a mistake. The court notes that learned counsel for the defendant was himself in error when he stated in his written submissions that the time for entering appearance was 12 days although he did subsequently submit that it should be 20 days.

[45] The court is of the view that the correct position to take would be to determine if the defendant had suffered any prejudice as a result of the non-compliance. In this case, the defendant successfully applied for leave to enter conditional appearance although it had failed to apply to set aside the writ within 30 days from the date of the order and had to apply for an extension of time. The court notes the defendant's arguments that the fact that they had managed to retain and instruct counsel within a short space of time should not be taken to mean that they had suffered no prejudice. However, the court is of the view that the more proper approach is to have regard to the justice of the case without dwelling overly on technical non-compliance where such non-compliance has not occasioned a substantial miscarriage of justice.

[46] Taking into consideration all relevant issues, the court finds that in this case the non-compliance of the plaintiff in giving the defendant only eight days to enter appearance did not occasion a miscarriage of justice. No adverse order was obtained against the defendant during this eight day period. Had such an adverse order been obtained, the court would have no hesitation in striking it down. The court finds that the non-compliance is but an irregularity which is curable under O. 2 r. 3.

To rule otherwise and to require the plaintiff to re-file his writ would have meant more delay in resolving the dispute between the parties and run counter to the dictates of O. 1A.

[47] A word on the issue of *forum non conveniens*. On the authority of *Kenichi Hattori & Anor v. Minoru Yamashita & Anor* [2004] 1 CLJ 491 and *Enersafe Sdn Bhd v. Megarina Sdn Bhd* [2006] 2 CLJ 1021 the court is satisfied that the four subparas. of s. 23(1) of the Courts of Judicature Act 1964 are to be read disjunctively. Whilst the defendant has sought to argue that the action in this case is in respect of the construction of a 12 storey hotel in Kuching and that the "breach of contract" accrued in Sarawak when the plaintiff failed to remedy the defects to the building, however upon a careful perusal of the statement of claim, the court finds that this is in fact not so. There is absolutely no mention of the construction of a 12 storey hotel or any other building and consequently no issue about any breach of contract. On the contrary, the plaintiff's claim is premised on the dishonouring of a Bank Muamalat Malaysia cheque issued by the defendant when it was presented for payment at the plaintiff's bank in Kuala Lumpur.

[48] Although the High Court at Kuching also has jurisdiction by virtue of the fact that the defendant has its place of business in Sarawak, however that fact does not allow the defendant to apply to strike out the writ for want of jurisdiction.

[49] Accordingly and for the reasons afore-stated, encl. 13 is dismissed with costs.

[50] In light of the above decision, encl. 21 which is the plaintiff's appeal against the decision of the SAR which stayed the plaintiff's application to set aside the *ex parte* order (encl. 11) until the disposal of encl. 13 is now academic. Enclosure 13 has now been disposed off. As such, the court makes no order in respect of encl. 21.